SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 16

THE SHOTWELL MANUFACTURING COMPANY (RENAMED HOMAN MFG. CO., INC.), A CORPORATION, BYRON A. CAIN AND HAROLD E. SULLIVAN,
Petitioners,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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The Government would avoid the hard questions on which certiorari was granted by arguing that petitioners were probably guilty of some variety of tax evasion, corporate or personal, from which it apparently is hoped the legal improprieties necessary to reaching a conclusion of guilt on the indictment at bar may be overlooked. No opportunity to blacken petitioners is overlooked. Indeed, the opening sentence of the Government "Statement" unfairly charges us with attacking the unquestioned integrity of the trial court. This unfounded charge is not men

tioned, much less supported, in the balance of the brief; its insertion in the opening is merely an attempt to prejudice petitioners (or their lawyers) at the outset.[1]

Petitioners deny guilt; however, a conclusion of guilt or innocence is not determinative of the issues and is one to be arrived at only by a jury fairly empaneled and which has not been misled by admittedly exaggerated confessional material coaxed from petitioners by promises of immunity from criminal prosecution, nor misled by false and "doctored" affirmative prosecution evidence.

QUESTIONS PRESENTED.

The Government refuses to face three of the questions presented by the Petition for Certiorari and argued in petitioners' main brief. Thus,

(a) The constitutional and common law questions as to admissibility in a federal criminal trial of evidence extracted from potential defendants by promising them immunity are converted, in the Government's brief, to the different question as to whether petitioners complied with the prosecutors' construction of the Treasury's "voluntary disclosure" program.

(b) The question as to whether federal criminal justice was abused by withholding exculpatory evidence from this Court, and from petitioners, while agents of the prosecution pressured the witnesses, is converted, in the Government's brief, into a question simply as to whether there was outright falsity (there was), in such testimony as actually was divulged to this Court.

[1] Petitioners were and are in strong disagreement with the trial court on his construction of the voluntary disclosure policy and on many of his factual determinations. But respectful and, we believe warranted, disagreement is not an attack on integrity. Our differences with the honorable trial court were frankly discussed with him. See App. 1777 ff.

(c) The question as to whether it was a denial of due process and a violation of civilized standards of justice for the District Court to re-enter judgments of conviction after it had found, on the new hearing, that the star witness for the Government before the jury had given seriously false testimony, is watered down, in the Government's brief, into the proposition that the trial judge merely "commented" that the witness had given exaggerated testimony.

Thus, the Government seeks to blunt three of the issues the Court must deal with.

On the other two, the Government still refuses to face reality:

Rather than answering our challenges (Pet. 33, Br. 93) to cite evidence that Jury Commissioner Crooks selected or exercised judgment as to picking jurors, the brief erroneously asserts, without a scrap of evidence to support it, that Crooks did all but the ministerial work.

Rather than defending the instructions which permitted the jury to consider against Sullivan evidence which had not been admitted as to him, the Government appears to make the illogical argument that since Sullivan claimed he had made a voluntary disclosure, he had no right to complain about instructions to the jury.

The case which the Court has the responsibility of deciding is quite different from the case depicted by the Governmment's brief.

We will shortly revert to the fundamental, and the only proper questions presently in the case, but before so doing it is necessary to correct at least some of the erroneous evidentiary assertions by which the Government brief endeavors to color the record. It is to be noted:

First, the Government cannot and does not in any way

dispute the accuracy of the Statement of Facts in petitioners' brief. Nevertheless, it resorts to a so-called restatement of the case which, though some 40 pages long, does not attempt to show that the Government sustained the detailed charges it leveled in this Court in 1956 and 1957 and which this Court enumerated in its opinion (See our main brief, pp. 53-55).

Second, the presentation is not limited to the facts as found by Judge Nordbye in his 1959 opinion, nor to evidence relating to the disclosure. It is a hopelessly confused commingling of evidence from the pre-trial suppression hearing, the jury trial, and the 1958 reopened hearing, coupled with assertions or suspicions as to what the melange proves. In large part the record references show the argument is based on the discredited, "exaggerated" testimony of swindler and perjurer Lubben[2] at the trial, or his "doctored" records which are brazenly tabulated at page 19 and presented to this Court as believable although the trial court on the new hearing found them to be "exaggerated".

Third, the entire presentation is tinctured with the underlying assumption that petitioners set out to corrupt someone in the Revenue Service rather than to make a voluntary disclosure. That assumption, at this stage of the case, is wickedly wrongful—the Government charged corruption when the case was first here; this Court so recognized and allowed an unprecedented opportunity for proof of the charge; the prosecutors brought "more than 64 witnesses"[3] before the grand jury (G. Br., p. 102) and appar-

[2] See note 19, p. 87, petitioners' main brief.

[3] This number contrasts strangely, and in petitioners' favor, with the fact that the prosecutors brought only 4 witnesses before Judge Nordbye on the reopened hearing—two Treasury employees, Wright and Lima, and Huebner and Graflund, from all of whom the prosecutors had lengthy statements *before* the grand jury began serious work.

only learned nothing helpful, for even their much "refreshed" and willing witness Agent Lima testified he had no knowledge of anyone getting any money and had not even heard "by hearsay or any other way of any fix in the case" (App. 1513) and Agent in Charge Wright admitted:

> "I can state unequivocally that there was never any pressure brought to bear on me by any higher official . . . or anyone else, to close this case in any other manner than that provided by law and regulations." (App. 1016.)

In decency, that should have been the end of the matter. Judge Nordbye refused to find anyone had been bribed and conceded that the Government's evidence left its claims "shrouded in mystery" (App. 1768). Certainly so serious a charge as corruption of Internal Revenue cannot, in decency, be advanced upon mere vindictive and frustrated assumption—such does not take the place of evidence and findings.

Fourth, unable to show that it sustained the charges it made to this Court in 1956-7, the Government in substance abandons them and resorts to other derogatory charges—the new claims are, for the most part, as specious as the false charge made here in 1957 that Busby could not have made a disclosure in the winter or spring of 1948 because he actually then knew nothing about the over-ceiling transactions. We examine some of the new claims below:

PARTIAL CORRECTION OF STATEMENT OF CASE

It is not difficult, if one is willing to rely on testimony branded by Judge Nordbye as exaggerated and given by one (Lubben) repeatedly found to be a perjurer, and upon "doctored" reports, and to ignore all impeachment and contradiction, to spin together from more than 5000 printed pages a story adverse to petitioners. This the Gov-

ernment's brief does. It would be impossible, save by an inordinately lengthy brief, to correct all the errors in it, for correcting erroneous assertions is a far lengthier process than is the making of them. We can only select typical points, demonstrate their complete or partial inaccuracy and respectfully request the Court to discount the entire Government Statement in the light of such a demonstration.

Footnote 33, page 37, is a striking instance of persistence in advancing an indefensible position: As pointed out in our main brief, petitioners' version of the whole disclosure process is logical, sequential and convincing; *i.e.*, the advice from Busby in January, 1948 to disclose, the disclosure within a short time, the assembling of data, the usual delays, the importunities to Revenue Service to start the investigation, the preparation of summaries and eventual turnover of them to agent Lima. In 1956 the prosecutors felt they had to produce some logical *reason* why that story could not be true (See our main brief, pp. 81-82, 29-34). They attempted this with the false affidavit procured from Graflund that Busby knew nothing about the black-market transactions until July 1948. That having failed, a *new* reason is now substituted as to why the testimony of a January 1948 disclosure is false.

The substitute reason is as baseless as was the first one. The new theory is that Busby and Cain contrived false testimony as to a January disclosure because, so claims the writer of footnote 33, petitioners knew an informer had gone to the New York Internal Revenue Office on March 4, 1948; they feared such date might mark the disclosure "timeliness" date, *ergo* they falsely pushed the disclosure back to January. However, The record destroys the present claim: *It shows that Cain and Busby swore to the January 1948 disclosure long before they knew of the asserted March 4, 1948 informer.* They swore to a January

1948 disclosure in their affidavits of May 26 and 28, 1952 (R. 13, 18) attached to the Motion to Dismiss which was filed June 2, 1952 (R. 10); they testified to the January events in the suppression hearing held on November 12, 1952 (R. 150, 168 ff. 220 ff.). Petitioners knew nothing about an asserted March 4, 1948 informer in New York until Government agent Twohig testified during the afternoon of November 13, 1952 (R. 325, 336). Cain and Busby had told their story *on the record* nearly six months earlier and been examined on it in open court a day earlier; they were not concocting fiction to counter or antedate the asserted March 4 event of which they were ignorant.

Cain and Busby testified to the January 1948 disclosure because it was the time as they recalled it. As Busby testified, the approximate date was "pinpointed very well with the trip to New York as far as I was concerned" (R. 214, *cf.* Cain, R. 250). Judge Nordbye has found that the trip to New York *did* occur in early January 1948; that Graflund *did*, on that trip, reveal to Busby that there had been over-ceiling transactions and that Busby *did* promptly recommend a disclosure be made. The truth is natural and consistent. It is corroborated by the fact that on June 4, 1948 (a date that fortunately could be nailed down through hospital records), Sullivan was complaining to another agent of the Treasury about the Treasury's delay in investigating the case (App. 1566-1570) and by the fact that Sauber concedes that during the spring of 1948 Cain was nagging him to get the investigation under way (R. 285, 287). (And Sauber's fixing of the disclosure as approximately March 15 rather than in late January may well have sprung from desire to shorten the Treasury's record of delay and administrative ineptness. See R. 299.) The argument of present Government footnote 33 therefore, which if accepted at face value is poisonous to petitioners, is without foundation. It is simply a vicious inven-

tion of a brief-writer, apparently not too familiar with the record, who sought to create an inference beyond Huebner's testimony on the reopened hearing that "*after* the suppression hearing," or "*around* that time. I am not sure of the date" (App. 925) he heard it had been learned an informer had been in the New York office.

2. Despite the facts that Huebner got records from Lubben in February 1948 for the purpose of reconstructing the Lubben transactions (G. Br. p. 35, n. 29) as Sauber had requested (R. 178), that Huebner showed them to Busby during the spring of 1948 (App. 1129), that Graflund worked with them fruitlessly trying to reconcile them with his knowledge of the events (App. 1166) and had preliminary discussions about the figures with Cain and Busby in April or May (App. 1092, 1156-1157), and despite the fact that at the conclusion of the reopened hearing Judge Nordbye conceded "I do not mean to imply, however, that defendants had not attempted between January and July to gain information as to Lubben's books and records and as to the data such records would disclose as to his contentions regarding the over-ceiling payments made to Shotwell" (App. 1762) counsel persist in asserting that no work was done in assembling or preparing figures prior to July 1948. Thus, at footnote 13, p. 27 it is said: "Actually, * * * no work was done on such a compilation until July 1948;" "* * * Busby and the Shotwell employees did not work on figures for a voluntary disclosure from January to July 1948" (p. 25), and, prior to the Belden-Stratford meeting, "Graflund had not been asked by anyone to assemble or furnish any records or data relating to the black market receipts from Lubben" (p. 36). These statements are flatly contrary to the Government's own record. In part, they come from using the word "compilation" in two senses. It always was testified by Busby and Cain that the summary sheets and "recapitulation" were not written

down, put together or "compiled" until July 1948. But it is equally certain, as testified to originally and as still found to be true, that the work of assembling or "compiling" data from which to make the sheets and recapitulation went on intermittently from January or February 1948 until the task was finally finished (see Petitioners' main brief, p. 19). Yet, the present brief leaves the innuendo that *nothing* was done, thereby still seeking to build an argument that the disclosure did not take place.

3. The most sinister innuendo of the present Statement is the impression endeavored to be created that for a $10,000 "fix" furnished by Huebner, Cain procured someone's agreement to settle the case on the basis of a $20,000 tax bill.

It is true that Huebner and Graflund finally testified that Cain said he had worked out a $20,000 settlement, and Lima ultimately said he had prepared a $20,000 agent's report. Huebner alone testified that Cain asked him for $10,000 with which to "fix" the case and that he gave it to him. Huebner gave no objective details which could be checked as to where he got the $10,000, how he transmitted it, or why Cain did not put up the money himself. He simply made a naked assertion which Cain flatly denied (App. 160, 1).

Manifestly, *if* in fact there had been any agreement for a $20,000 settlement in August 1948, *if* Cain in fact had been boasting about it, and *if* Huebner had been calling Graflund on the long distance telephone to tell him about the happy event, word of it would have leaked out, if not immediately, certainly by the time of the suppression hearing in 1952, to say nothing of the trial in 1953. Mrs. Morrill, Shotwell's office manager (R. 746 ff.) knew and worried about the general problem; Roeser, who as Graflund's predecessor as Shotwell's comptroller had handled some of the

funds (R. 1700 ff.), did; Ericson, Shotwell's plant superintendent who sent out the so-called "unbilled" shipments (R. 1798 ff.), did. All appeared as Government witnesses in 1953; all were before the new grand jury in 1956. It is impossible that if there had been a $20,000 settlement which Cain revealed to Huebner and Graflund, that the others who, before the initial indictment, were deeply concerned would not have heard about it. However, Roeser, Ericson and Mrs. Morrill were not brought on in 1958 to corroborate the new story of a so-called $20,000 settlement which Cain had denied (App. 1608).

More startling, Huebner, when initially questioned during the reinvestigation in 1956, could not remember having sent a wire to Graflund, or of getting a telephone call from Graflund in which this alleged happy settlement, supposedly at a cost to him of $10,000, was discussed (App. 912).

Equally important, Lima, after numerous interviews and after being subjected to a lie detector test, did not even on his second tour before the new grand jury on October 8, 1956 say anything about the amount of the supposed tax, about a proposed $20,000 settlement or about an 870 Form (App. 1465-1466); even when on the stand before Judge Nordbye he "didn't have any recollection of how [he] arrived at this alleged figure of a $20,000 tax" (App. 1514).

There was, however, a factual situation from which the distorted present contention might arise: Shotwell had an unfavorable excess profits tax base; it had a claim under Section 722 of the Revenue Code for an approximate $250,000 tax *refund* pending at the time of the disclosure (App. 1279-1281). If that refund claim could have been prosecuted successfully, and even if the tax liability on the Lubben transactions was conceded to be at the high figure placed at the trial of approximately $286,000 the difference between the hoped for $250,000 refund and the possible

$286,000 liability would be somewhere between $20,000 and $40,000; such difference would have been the entire amount of cash necessary to square Shotwell with Internal Revenue. Gratlund admitted in 1958 that he was aware of the refund claim, although he did "not particularly" recall ever discussing with Cain that the 722 refund claim might be used as an offset against the possible liability on the Lubben transactions which, he says, was a "complex subject", that "would be for a tax man" (App. 1281). Huebner also admitted he was aware the refund claim was pending ~~but~~ that was about all he would admit for "they didn't take me into their confidence concerning the Company's tax problems" (App. 766).

Finally, as to the "fix": In his affidavit to this Court (Supp. Mo. Remand, p. 9), Huebner merely asserted that he gave two $5,000 payments to Cain who *later* "told me he had turned the money over to *someone* to take care of a tax fix." But by the time Huebner got before Judge Nordbye this was embroidered—he testified that Cain said *in advance* that he was going to give the money to a "Kennedy" who was the "in-between man" (App. 688). Cain swears nothing like this ever took place (App. 1608). In any event, either Huebner hadn't conceived the name "Kennedy" when he made his affidavit for this Court or, if he had, the prosecutors withheld the name because the story would not withstand investigation. And if some "Kennedy" was believed to be an "in-between man" in the non-existent bribe, why was he not indicted in the second indictment or, in the alternative, offered as a witness here?

Thus, the $10,000 "fix" or bribe theory rests upon contradictory words alone. While that testimony comes far from establishing bribery or corruption of any variety, it is apparent that Huebner attempted to, and did, cast himself in the role of an accomplice. There is no stronger rule than the one that testimony of an accomplice "should be subject

to close scrutiny and minute examination, and weighed with great caution." (See, for example, *Caminetti* v. *U. S.*, 242 U. S. 470; *Arnold* v. *U. S.*, 10 Cir., 94 F. 2d 499, 501.)

And on any question of credibility on this or any other point, it is to be noted that it is only the Government's star witness Lubben, who judicially had been found to be a perjurer in other cases, who is found here to have "exaggerated" his testimony to the jury. Only Government witnesses Huebner, Graflund and Lima are found to have been guilty of "glaring inconsistencies and contradictions" in their statements and prior sworn testimony (App. 1769). Contrasted to this petitioners Cain and Sullivan (and Busby) have been consistent throughout. Petitioners have earned enviable reputations for truth and veracity and produced outstanding witnesses from commercial, religious and public life to testify to that fact (R. 2686-2704).

4. In a further effort to lay supposed villainy against petitioners, the Government brief (p. 32) has a section entitled "The Scheme of Buy Out Lubben," arguing that in June 1948 Cain offered to form a syndicate to buy Lubben's property and tried to have the latter go to South America "in order," so it is said, "to deprive the Government of its key witness" or his records. This contention is based on testimony perjurer Lubben, partially supported by his lawyer, Davidson, gave to the jury in 1953. *If* it were true that petitioners by June 1948 had made no discovery, or had done nothing to prepare compilations of receipts made to conform with Lubben's "records," the contention, at least would make sense for there then would be a possible purpose in getting Lubben out of the country and disposing of his records. But once it was irrefutably established out of the mouths of Government witnesses on the new hearing, and found as a fact by judge Nordbye,

that petitioners *had* sought out and procured some of Lubben's records and *had* told the Government they were going to conform their reconstruction of the account to Lubben's claims, the contention becomes foolish. Petitioners, rather than concealing Lubben and his records, *had*, prior to June 1948, voluntarily gone to the Government, *had* told it that Lubben had paid Shotwell a large sum of money, and *had* said that in reconstructing the transactions they were going to prepare figures which conformed to Lubben's.

If well may be that this false claim that petitioners tried to spirit Lubben out of the country helped prejudice the jury against petitioners in 1953. But the record now demonstrates that that claim never had validity; it certainly can not be maintained on the present record. The jury may have believed this claim in 1953, but certainly Judge Nordbye did not in 1959 because he made no finding on it.

Lubben in fact did later move to Puerto Rico and for his own reasons and without inducement by petitioners.

The claim is another example of perjurer Lubben's direct inversion of truth. It was strongly contradicted when made (although the Government brief does not so indicate). Rather than being induced by petitioners to go to the Caribbean or South America, Lubben wanted to go and approached Cain and others for financing. Lubben was in serious difficulties with, and in mortal terror of, his racketeer former partner Giglio (see *Lawn* v. *U. S.*, 355 U.S. 339) who had warned him that if he ever talked he would "find himself in a cement box at the bottom of the Hudson River" (R. 1061).

According to Cain and his New York lawyer, Patrick Grace, Lubben, in late June 1948, telephoned Cain at the latter's hotel in New York and requested a meeting at a Riviera Club half way between Cain's hotel and Lubben's place in New Jersey. At the Riviera Club Lubben told

Cain he could secure a Coca-Cola or Pepsi-Cola franchise outside the country but would need a substantial amount of money. He requested a loan. Cain said that if anything developed and if Lubben actually got the franchise, to get in touch with attorney Grace. In late July or early August Lubben told Grace that he had, or was then securing, a passport for South America and wanted to know if Cain would lend him $40,000. Upon being turned down by Grace, Lubben went to see one Morley Cramer in ...on. From Cramer's office he telephoned Cain in ...hicago and said he wanted $135,000 from Cain and Cramer; Cain turned him down (R. 2081, 2559, 2563, 2621). Cramer verified the foregoing, testifying that he never heard of a syndicate to buy out Lubben but that in early August Lubben came to his office in Boston and said he was in trouble; that he needed $135,000 to go either to Haiti or the Dominican Republic. Cramer turned him down (R. 2074-2076).

The Government supplements its present argument by referring to Huebner's testimony at the new hearing that some time in July 1948 he attended a meeting with petitioner Sullivan and Ed Urban of the Close Candy Company at the Chicago Athletic Club at which there was a discussion as to buying out Lubben's business and obtaining his records. That testimony by Huebner is one of the pieces the prosecutors worked hard to get. In his early interrogations by the prosecutors on September 17 and again on September 26, 1956, Huebner "recalled nothing" of any such occurrence (see our main brief, p. 38). This is but one of the "glaring inconsistencies and contradictions" which Judge Nordbye admitted studded Huebner's testimony. Judge Nordbye's failure to make any finding as to a meeting at the Chicago Athletic Club must be taken as tantamount to a finding that Huebner was not to be believed on this point.

Such specious material should not be advanced at this stage of the case.

5. Perhaps of lesser importance than the matters we have mentioned, but indicative of the unfair technique employed in the Government brief, is footnote 16, page 24, which says that although petitioner Cain testified on the new hearing, he was asked only seven questions on direct, "*all of them on rather tangential matters.*" Cain was seriously ill. His doctor finally agreed he could go on the stand if his appearance was limited to a half hour (App. 1544, 1551, 1615, 1619). This permitted but limited testimony and the questions were restricted to new matters that had appeared on the hearing before Judge Nordbye. Instead of going to "tangential" matters, as Government counsel unfairly tell the Court, the questions went to what seemed to be important. Two were as to the alleged obtaining of $10,000 from Huebner with which to "fix" the tax case; Cain denied this (App. 1607). Counsel certainly do not regard it as "tangential" because they stress Huebner's version in their present brief. One of the questions produced Cain's denial that he ever told anybody he had settled the case for $20,000 (App. 1608). This is a point counsel do not regard as "tangential." Another brought out Cain's denial that he ever told Huebner to keep quiet, etc. (App. 1608). This is a point counsel still stress.

In other words, counsel are saying that when their "refreshed" witnesses testified to a point on the reopened hearing it was important, but if Cain denied the testimony the denial was as to a "tangential" matter. Such illogicality is, to say the least, confusing.

ARGUMENT.

I.

PETITIONERS WERE INDUCED BY PROMISES OF IMMUNITY TO SURRENDER CONFESSIONAL MATERIAL.

(Petitioners' Main Brief, pp. 12-26, 67-75.)

A. Because of the Promises They Came Forward Before They Were Accused.

When the case was first here the Government charged that petitioners did not come forward or prepare or surrender any documents because of the promises of immunity since, so it was claimed, they made no disclosure until *after* the Revenue Service had commenced an investigation and were motivated by the investigation. The Government promised to prove that petitioners were motivated to disclose and to turn over documents by knowledge of an already started investigation against Shotwell. However, the new hearing proved conclusively that the disclosure was made *before* any Government investigation of Shotwell. Indeed, the *only* investigation ever made was that which stemmed from the disclosure and the Government now, in complete reversal, admits: "• • • the defect which vitiates the disclosure is not untimeliness • • •" (p. 63): "petitioners were not • • • even approached by any Government agent prior to their disclosure" (pp. 43, 68).

It now conclusively appears that because petitioners wished to avail themselves of the offer of immunity they voluntarily came forward before they were approached by the Government or accused of any wrongdoing and disclosed Shotwell as having filed erroneous returns. They

were told to assemble such information as they could as to the over-ceiling *receipts* and proceeded to do so. It is that computation or compilation, shown by Government witnesses Huebner and Gratlund not to be accurate but to be exaggerated to fit the "exaggerated" claims which Lubben was making, that is now said to be the damaging "admission" that could be introduced against them on a criminal trial.

B. Probable Truth or Falsity of Declarations or "Admissions" Induced by Promises of Immunity Is Immaterial to a Decision as to Their Constitutional Admissibility.

We argued in our main brief (pp. 74-5) that the holdings of the District Court and the Court of Appeals, (wholly ignoring the constitional question), were that confessional material obtained from a potential defendant by promises of immunity may be introduced against him if part of it is false. The Government now professes to agree, as it must, "that the admissibility of an inculpatory statement [does not turn] on its truth or falsity or on the purity of the motives" of the declarant (pp. 44, 69). But it backs away and quite to the contrary of what it has admitted argues that the documents at bar were admissible because they were a "half-truth disclosure" (p. 61). It argues, "It is inconceivable that [the rule barring use of confessional material] should operate to exclude a declaration in which damaging admissions are inextricably intertwined with false, self-serving exculpatory statements" (p. 58).

The Government's brief is a contradiction in terms for most of it is an argument that truth or falsity *should* be considered in determining the constitutional and common law admissibility of confessional statements. It argues that

"admissions" which, by its own new evidence, "admit" much that did not occur (see our br., pp. 16-18, 22-23) may be used to convict citizens if "inextricably interwoven" with the "admissions" are exculpatory statements which also are partially false (G. Br. 42, 44, 61, 72). Until Judge Nordbye's decision and the second Court of Appeals decision herein no American court had ever embraced so noxious a doctrine that confessional material *should be admitted because it is false.*

The Government argues in substance that the disclosure was not induced by the promises of immunity but was a simple voluntary act of individuals intent on defrauding the Government. It would read the promises of immunity out of the record. But that cannot be done. *There is not a scintilla of evidence that petitioners would have come forward had the promises not been made.* Strangely enough, the Government concedes "petitioners may have been prompted, in part at least, by the desire to avoid criminal prosecution" (p. 60).

Then follows an argument to the effect that a citizen always knows that when a prosecuting official asks for statements or confessions he wants truth, from which it is argued that if the declarant does not tell the full truth he is not fulfilling the condition laid down by the officer; therefore, he is not relying on the promise of immunity but is engaged in some form of chicanery; therefore, his "admissions", even though known to "admit" things that did not occur, may be received against him in criminal trial. No authority, decisional or philosophical, is offered for this startling doctrine which is squarely counter to many decisions of this Court that confessional material, even though probably completely *true*, cannot be received if induced or procured by impermissible means (See *Rogers* v. *Richmond*, 365 U. S. 534; *Lisenba* v. *California*, 314 U. S. 219, 236; *Blackburn* v. *Alabama*, 361 U. S. 199, 206).

Finally, the Government admits that a defendant would "obviously be entitled to the exclusion of that confession, even though it may have been false and intended to deceive" if there had been "intense psychological pressure * * * to extricate himself from his predicament" (p. 69). The Government's present position that the psychological force of a promise of immunity should be measured and be found insufficient is precisely contrary to *Bram* v. *United States*, 168 U. S. 532, which at page 543 adopts Russell's statement:

> "A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner and therefore excludes the declaration if any degree of influence has been used."

Bram, at page 554, cites with approval *Reg.* v. *Moore* (1852), 2 Den. C. C. 522, for the proposition "that if the threat or inducement was held out, *actually or constructively* by a person *in authority*, it cannot be received, *however slight the threat or inducement.*" (Italics in original.) Certainly here a considerable degree of influence was used and this the Government concedes at page 60.

The Government brief argues that no inducement by one in authority would bring constitutional protections into play unless the pressure was so great that the citizen's "will has been overborne and his capacity for self-determination critically impaired" (pp. 43, 65, 67, 69). This is the type of uncritical reliance upon one opinion in *Culombe* v. *Connecticut*, 367 U. S. 568 which was prophesied when that opinion was announced (367 U. S. at 636). *Culombe* involved no promise of immunity and is almost wholly beside the point; nor did it purport to overrule *Bram*. The Government brief writers answer themselves

when they concede an inducement to a disclosing taxpayer might be enough so that taxpayer (not described as overborne in will) "might be entitled to the exclusion of the disclosed documents" and the brief admits a false promise would require suppression, for that would be "trickery • • • false pretenses" (p. 69) although no overbearing of will was involved.

Finally most of the Government brief labors to convince this Court the petitioners did not come into the Treasury to make what the brief writers call a "good faith disclosure." Yet when we come to the constitutional question of whether "good faith" or lack of "good faith" determines the right to invoke constitutional protections, a question Justice Black originally indicated has not been decided by this Court, the Government twice says it wishes "to emphasize that it is not our position that the admissibility of an incülpatory statement turns on • • • the purity of the motives which impelled it." (pp. 44, 69).

Our brief at p. 70 cited *Rex* v. *Barker*, 2 K. B. 381 (1941) where the British courts squarely held that a taxpayer's demonstrated lack of good faith in presenting false documents for the purpose of reducing tax liability under the English voluntary disclosure doctrine did not permit those documents to be used to incriminate the taxpayer. The Englis' authority is sought to be distinguished away by the Government (pp. 63, 64) because two sets of documents were involved, produced at different times. That, while true, is immaterial for it was the *false* documents which the Court specifically held could not be used, saying at p. 384:

> "• • • the court is of opinion that if, as a result of a promise, inducement or threat, such books and documents are produced by the person or persons to whom the promise or inducement is held out, or the threat

made, those documents stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat.

"The result is that, in the opinion of the court, these vital documents and books, namely, the ledgers and the working papers of the appellant, were wrongly admitted in evidence and in those circumstances the conviction of the appellant cannot stand."

Reduced to essentials, we suggest that the pervading vice of the Government position is that it confuses the question as to whether petitioners performed completely enough under the voluntary disclosure program to be morally entitled to immunity, with the wholly different question as to whether the Government, having induced petitioners to come forward by promises of immunity and to make damaging "admissions", could then constitutionally use those "admissions" against them in a criminal proceeding. What we are concerned with here is a basic constitutional question of criminal law, not niceties of the disclosure program.

C. Common Law Inadmissibility.

The Government makes no effort to answer our argument that the "admissions" at bar, apart from the constitutional prohibition, were inadmissible at common law. At common law confessional material obtained by promises of immunity is inadmissible because of its inherent unreliability (see main br., pp. 72-74). This case furnishes a classic example of the wisdom of that rule. Petitioners, to gain immunity, were willing to "admit" that Lubben paid Shotwell many thousands of dollars he had not paid at all. Both Huebner (App. 797-800, 967-968) and Graflund (App. 1063, 1245-1247), testifying as Government witnesses, so agreed. Yet this "exaggerated" confession was used to convict petitioners. We suggest such a process is abhorrent to civilized standards of justice.

II.

JUSTICE WAS ABUSED IN THE REMANDMENT PROCESS.

(Petitioners' Main Brief, pp. 76-84; 28-48.)

The Government makes no genuine attempt to justify its action of inducing this Court to withhold action when this case was first here so that for approximately 15 months witnesses could ceaselessly be interrogated. The actions of the prosecutors in 1956 and 1957, the calculated withholding of highly material evidence from this Court on the remandment proceedings, and the elusive arguments of the present Government brief are in shocking contrast with the concession that a duty of "excessive candor" (p. 98) was owed.

There is not the faintest indication in the record that the prosecutors ever intended to come clean with this Court, the District Court or petitioners, (and we suspect the Solicitor General was never fully advised). It must be remembered that the prosecutors procured their "refreshed" evidence prior to this Court's decision in *Jencks* v. *United States*, 353 U. S. 657, on June 3, 1957. They doubtless thought, when they insisted on their Motion to Remand, that the witnesses' statements which contradicted the sweeping assertions of the Russo affidavit would never, in a criminal case, see the light of day. *Jencks* put a salutary end to that. And they "had not anticipated" (App. 834) that counsel for petitioners could force production of the relevant and devastating grand jury minutes.

The fact is that on December 6, 1955 the Justice Department, acting on the hearsay affidavit of detective Yaden, asked this Court to withhold action; on June 1, 1956 a second request for delay was made (see "Chronology," App. C, Pet. Br.), even though by that date each of the witnesses the Government ultimately produced had been

interviewed and reinterviewed (see "Chronology"). The stories of the witnesses, as of June 1, 1956, were not deemed satisfactory for display to the Court.

On September 19, 1956 Prosecutor Russo, acting as a witness, made the hearsay affidavit attached to the Motion to Remand. That affidavit contained the assertion "that prior to June 21, 1948 * * * no disclosure, voluntary or otherwise, had been made." (See "Chronology".) With that affidavit the prosecutors placed themselves in a position where somehow they had to make good on the claim; inevitably the witnesses had to be further pursued. They were:

Thereafter came into existence for the first time Huebner's asserted recollection of a meeting with Sullivan and Urban at which destruction of Lubben's records was discussed;

Thereafter came into existence for the first time Lima's testimony that he had prepared and destroyed a Revenue Agent's report and had made a $20,000 tax computation;

Thereafter came into existence for the first time Graflund's testimony that he had not informed Busby of the black market dealings in January, 1948 and that Busby knew nothing about them until approximately July 1, 1948;

Thereafter came into existence for the first time Huebner's assertion that he had been kept off the stand on the original proceedings because he threatened to tell the truth. (See "Chronology" App. C, main br. for all time steps.)

The virtually unbelievable, were it not for the documentation of this record, fact is that the most striking pieces of "new" evidence ultimately tabulated in this Court's opinion, and which motivated it in granting the order of remand, came into existence weeks or months *after* the Mo-

tion to Remand was filed. No mere question of credibility is involved—the matter goes much deeper—it is a question of when and how the "new" evidence came into being.

If this Court were to condone what went on here it would, in effect, overrule *U. S. v. Zborowski*, 2 Cir., 271 F. 2d 661, 668, which holds that prosecutors must present their evidence in its "true colors" and cannot conceal, but must voluntarily reveal grand jury evidence which contradicts or bears on the credibility of their witnesses.

Moreover, if the Court were to condone what went on here it would be saying that federal prosecutors are free to apply for partial remandment orders so that they may gain time to get witnesses to change, or improve their uncoached testimony—testimony not given at the behest of any defendant but by witnesses wholly out of control of the defendants and "cooperating" with the Government before a grand jury. The effect of such condonation upon standards of criminal justice throughout the country would be sorry indeed. Any experienced lawyer or judge realizes that a prosecutor, federal or state, holds a powerful office; he moves in an area in which emotions and ambitions frequently are involved. There are, unfortunately, some overly ambitious or overly zealous prosecutors. Judicial condonation of the sophisticated indecency inherent in the methods by which the Government testimony here was produced would stand as an invitation to such prosecutors to use like tactics.

The Government's brief makes four main points: ***First***, it says that all that was involved was a mere question as to credibility of its witnesses. This patently is not so. The Government made, in this Court, one of the most unfavored motions in the law—a motion for a new hearing or trial on the ground of asserted newly discovered evidence. But not a witness, save Huebner, was "new." It is highly mate-

rial to such a motion precisely how and when the asserted "new" evidence from old witnesses came to the attention of the movant. (See, for example, *U. S. v. Johnson*, 7 Cir., 142 F. 2d 588; approved by this Court; see 327 U. S. 106.)

Second, the Government's next argument is that Graflund, Huebner and Lima did in fact give before Judge Nordbye precisely the testimony this Court was advised they would give. This is merely saying that pressure was successful. The answer is twofold: *First*, Huebner did *not* give precisely the testimony this Court was advised he would give. On his most sinister and sweeping charge of a conspiracy of perjury, namely the assertion that he originally had been kept off the stand because he threatened to tell the truth, Huebner gave no testimony whatsoever before Judge Nordbye! *Second*, the question is not whether the witnesses stuck to the "new," improved testimony that had been procured from them after months of brain-washing and "refresher courses." The question is whether that testimony possibly can be true; further, true or false, whether our system of justice permits testimony to be procured in this fashion; and, finally, all else laid aside, whether the prosecutors were under a duty of candor to advise this Court and petitioners that the affidavits they finally tendered here to "cast the darkest shadow" upon petitioners were nothing more than recantations of previous solemn testimony given by the same witnesses to a federal Grand Jury at the behest of the prosecutors. How can the Government possibly claim it lived up to its admitted (p. 98) duty of "excessive candor"?

Third, the Government says (p. 91) that with one exception "every statement contained in Graflund's affidavit and every statement contained in Huebner's affidavit, *if mentioned at all in Judge Nordbye's order*, was found to be the truth." The weakness of that argument is its

qualifying phrase "*if mentioned at all.*" The fact is that in instance after instance Judge Nordbye shrunk from the disagreeable facts of the record and failed to make square findings, pro or con, on issues on which clear findings should have been made. His opinion is not keyed or responsive to the detailed issues enumerated in this Court's opinion (See our main br., pp. 53-55).

Fourth, the present brief asserts that Judge Nordbye found that Cain, Busby and Sauber testified falsely in many respects as to the "time and manner" of the disclosure (p. 93). This brings us down to pretty small potatoes—when the case was first here counsel were not quibbling about "time and manner." Mr. Russo's affidavit was that "*no* disclosure, voluntary or otherwise," was made prior to June 21, 1948; it was charged "the testimony which placed the date in . . . January or March 1948 was perjurious" (Br. for U. S. No. 1, O. T. 1957, p. 33); "*no* move was made" prior to June 21, 1948 (*Idem*, p. 25). The overwhelming thrust of the charge was that literally *nothing*, *no* disclosure, *no* collection of figures, occurred until after June 21, 1948, and that because Huebner had threatened to tell the truth and to say that nothing had occurred he had been kept off the stand. All of that has been proved false.

Let us see precisely what Judge Nordbye found as to time and sequence. This examination will take us some distance from our principal point but there is no other way of meeting counsel's generalized assertion.[4] Judge Nordbye found:

A. That Graflund did reveal the black market facts to Busby in early January (App. 1760).

4. We think a detailed factual argument is not proper here, and that the Government's contentions in this regard should be ignored. If the Court agrees with us it may wish to skip to page 32 of this brief.

B. That Busby "stated at the first suppression hearing that he was prompted to make the disclosure to Sauber at this time [January] because he first learned of the * * * transactions from Graflund when the two were together on a train coming from New York" (App. 1758).

C. "The exact time that Busby made a visit to Sauber's office is difficult to pinpoint * * * it is fair to find that * * * [it was] some time before" June 21, 1948 (App. 1760-1); and apparently some time before June 4, 1948 because the Judge accepts Horgan's testimony that Sullivan was complaining about the delay of the Revenue Service in closing the case (App. 1761). "It is difficult to understand why Sullivan became concerned, at that early date [June 4, 1948], over the so-called delay when no figures had as yet been presented to any revenue officials * * *" (App. 1761). (It is not "difficult" to understand under the sworn, unimpeached, unrecanted, uncontradicted testimony of respectable citizens Cain, Busby and Sauber that the disclosure in fact was made in the late January-early March period and under the sworn, unimpeached, unrecanted, uncontradicted testimony of the same witnesses that they were not to "present" figures but were to await the appearance of a Revenue Agent at the plant who would conduct a regular investigation or audit. There is not a scintilla of evidence that the disclosure was made any later than "approximately" March 15, the time as Sauber recalled it. Judge Nordbye's "difficulty" stems solely from the impermissible process of attempting to allow speculation as to a later date overcome evidence that it occurred earlier.)

D. "It is fair to find from the evidence that Sauber informed Busby, as well as Cain * * * to disclose the entire black-market premium receipts, *and to make a computation of all the alleged offsetting premium disbursements which Shotwell allegedly made for raw materials*" (App. 1761). (There is not a scrap of evidence in the entire record that

remotely justifies the italicized portion of the finding. On the contrary, the evidence is utterly clear and undisputed that Sauber always told Busby and Cain, *as then Treasury regulations required*, that Shotwell's "premium disbursements" were immaterial. The inclusion of so totally erroneous a statement in the findings demonstrates how confused the matter finally became—it demonstrates also that the trial court had focused attention so completely on the "Disbursement" section of the "recapitulation" that he persuaded himself there must be testimony somewhere that Sauber had ordered it to be prepared. There is no such evidence. The portion of the finding we have italicized should be ignored as wholly without support. If this criticism be thought too harsh, we suggest that Government counsel, on oral argument, show where the evidence to support the finding is. And the point is important, for it seems to be the foundation for the unsound argument that petitioners hoped to gain a tax advantage by the "Disbursement" section of the "Recapitulation.")

E. "Cain's plans were to effect an early settlement * * * before any government agents pried into the company's books and records" (App. 1762). (Not only is there no evidence whatsoever of such a "plan" but the finding is grossly illogical and flies in the face of evidence which the trial court credited. *1st*, the trial court credits Horgan's testimony that on June 4 he was implored by Sullivan to intercede with Sauber to send an agent "to pry into the company's books and records." *2nd*, the court credits, we say improperly, Huebner's claim that "in the summer of 1948" Cain said he had been able to settle the case for $20,000 and that Huebner was so relieved he promptly telephoned Graflund "*who was on his vacation.*" *If* the Huebner testimony be believed the vacation necessarily places the alleged event in August 1948 *after* a Revenue

Agent had been assigned to "pry into the company's books and records" and actually had started the prying. *3rd*, Busby, Cain and Sauber all swear that Sauber said from the beginning that an agent would make an investigation or "audit." *4th*, it imputes a remarkable degree of ignorance to an intelligent business man (Cain) to assume that he ever entertained the impossible notion that the Treasury would settle Shotwell's case without examining its books.)

F. "• • • Busby is wrong when he states that he and the Shotwell employees were working on figures for a voluntary disclosure from January 1948 to June 1948" (App. 1760). (But Busby never testified in the sweeping fashion the finding indicates; he said the work "covered that span of time" but was intermittent, "part of the time I didn't work on it." See our main brief, page 19. Inconsistently, the Court also found, "I do not mean to imply, however, that defendants had not attempted between January and July, 1948 to gain information as to Lubben's books and records as to the date such records would disclose as to his contentions regarding the over-ceiling payments • • •" (App. 1762). This concession was compelled by *Government* evidence that Huebner had procured some of Lubben's records, had delivered them to Graflund who worked with them fruitlessly trying to reconcile them with Shotwell's version of what had occurred. See recitals at pages 15, 19, orig. br. In April or May Graflund had "preliminary discussions" with Cain and Busby on the problem (App. 1156-1157). As Cain put it, "The agent didn't appear and he didn't appear, so it dragged" (R. 233)—unfortunately a normal and natural sequence.)

G. "March 15, 1948 was just an arbitrary date which was agreed upon by Cain, Busby and Sauber in that the latter would testify that it was about that date when Busby first visited him. But obviously it was much later when

Sauber was informed that Shotwell was the offending taxpayer" (App. 1764-5). (The foregoing sentences are naked conclusion or speculation unsupported by a scrap of direct evidence. They depend on accepting the much impeached and contradicted Huebner's 1958 testimony that during the 1952 disclosure hearing he said to Cain that he thought June 15 "was supposed to be" the disclosure date and that Cain told him to be quiet, as against Cain's denial (App. 1608) of any such conversation. From the Huebner story it is rationalized that March 15 was an artificial, contrived date. But certainly if Cain was going to contrive an artificial date he would not have contrived one that fell during a period when he was not even in Chicago but was in California helping run a fund-raising party for his church (App. 1422-1427). And if he contrived March why did he testify to January?)

II. "It was not until some time in July, 1948, however, that any concerted effort was made by this defendant to make up a so-called voluntary disclosure" (App. 1762). (We respectfully call attention to the insight the foregoing statement sheds on the erroneous legal standard that governed much of the trial court's thinking—implicit in that statement is a refusal to recognize the act of coming forward and disclosing a taxpayer as an offender as the act of "voluntary disclosure;" implicit in it is the concept that only the subsequent presentation of correct figures constituted a "voluntary disclosure"—such concept is wholly wrong as the statements of the policy clearly demonstrate.)

I. Out of the foregoing confusion, and reconciling as best one can the trial court's utterances, the following emerge as *facts conceded by the trial court:* On or about January 11, 1948, Busby learned of the black-market transactions and promptly advised that a disclosure be made; promptly efforts were made to learn what

Lubben's claims were and to reconcile them with Shotwell's information; at some unspecified date *after* March 15 but *before* June 4, 1948, the Busby-Cain-Sauber meetings took place *at which the parties said and did precisely what they originally testified to*, the only difference, in the court's view, being that the conferences occurred at this later date rather than in the January-March period as we contend was the fact; that, whatever the date may have been, no independent investigation of Shotwell had been commenced so that the disclosure was timely; the assignment of Lima to examine the taxpayer was a direct result of, and pursuant to, the disclosure rather than in spite of it.

J. Finally, the direct and specific charge of perjury was made here—petitioners were entitled to a square finding on it and did not get it. Judge Nordbye's opinion skirts the issue and does not use the term "perjury." Thus he says only that Busby is "wrong" in fixing a January date. This is quite different from a finding of wilful falsification. If petitioners, on the original proceeding, had served up a perjurious concoction of events that had not occurred the court should, and doubtless would, have so found. And it is to be noted that the 1956 grand jury before which the evidence now here was developed refused to indict anyone for perjury because they had said that the disclosure was in the January-March period!

The forgoing analysis demonstrates that if all of Judge Nordbye's findings supported by any evidence be construed against petitioners, they amount only to a finding that the disclosure took place precisely in the *manner* originally described but at some undetermined time between March 15 and June 4, 1948 rather than in the late January-early March 1948 period. We do not think the March 15-June 4 conclusion of Judge Nordbye can be permitted for there is mere speculation and no evidence of a disclosure at

that date. It is conceded that the disclosure was made. The only evidence, and it is logical and consistent, remains uncontradicted, unimpeached and unrecanted that it was made in the January-March period. That evidence cannot be wafted aside simply because it is displeasing.

With the single exception of the date, Judge Nordbye did not find in any way that Busby or Cain or Sauber misrepresented to the Court in their 1952 and 1953 testimony what Busby and Cain had told Sauber. He finds, in essence that they correctly described what went on in the disclosure but that the disclosure itself was fraudulent, in his eyes, because, when disclosing for Shotwell, they should also have informed upon themselves personally as *presumed* personal tax violators.[5] But that assumed fact, which petitioners strongly deny, would, under 1948 tax rules have made no difference in Shotwell's tax liability.

* * * * *

When the case is viewed in retrospect, the following things are clear:

1. When the Treasury induced the Department to apply for delay in this Court on December 1, 1955, it did not have any evidence in direct conflict with the testimony as to the disclosure.

2. When the second application for delay was made, all four of the Government witnesses subsequently produced had been interviewed. They were fully "cooperative" but their stories *at that time* would not support a motion to remand.

3. When the Motion to Remand was filed in October 1956, Graflund, Lima and Huebner had all testified at

5. The looseness that prevails in the case is typified by the fact that counsel (and the trial court) feel free to berate petitioners Cain and Sullivan as personal tax violators in spite of the fact that their personal tax returns are not even in the record.

length before the grand jury but their stories still were not deemed satisfactory. The motion was supported only by the hearsay affidavit of Prosecutor Russo.

4. After October 15, 1956, there came into existence for the first time, after repeated further interrogation of the witnesses, the most striking pieces of evidence ultimately presented to this Court in the form of the Huebner and Gratlund affidavits and the representations as to what Lima would testify.

5. The basic claims to this Court that Busby could not have made a disclosure until after July 1, 1948, that no work was done on assembling figures, that no disclosure was made until after July 1, 1948, that Huebner had been kept off the stand because he threatened to tell the truth were false.

Not an inkling of the process of eroding away the witnesses' original sworn, uncoached evidence was ever given to this Court.

No real defense is even now made for the relentless interrogations of the witnesses detailed at pages 28-47 of our brief,—only that Gratlund and Huebner were not subjected to the "*intimidation of coercion*" (p. 103). (Observe that even that weak claim is not made as to Lima.)

To assert that the prosecutors fulfilled their obligations of decency and candor or that this Court was fairly dealt with would be to deny words their usual meanings.

III.

A NEW TRIAL SHOULD BE GRANTED BECAUSE THE GOVERNMENT'S NEW PROOF DISCLOSED THAT THE ORIGINAL CONVICTIONS WERE SECURED ON FALSE TESTIMONY.

(Petitioners' Main Brief, pp. 84-89.)

Nothing in the diffuse Government brief contradicts in any effective manner what is said in our main brief. Lubben has been found to be a perjurer in other cases and found to have delivered "exaggerated" testimony here. "Exaggerate" means to falsify deliberately. Struggle as they will, counsel cannot wash away that finding.

The Government's attitude on the trial, and even today, is in striking contrast with what it said about the amoral Lubben in the *Giglio* and *Lawn* cases in New York, where he also was used as a witness. There the prosecutor told the jury that Lubben was:

> "• • • a perjurer and a black marketeer and practically anything else you care to talk about." (R. 2589, *Giglio* v. *U. S.*, 355 U. S. 339.)

Lubben was thus presented in his "true colors" in New York.

But in Chicago trial counsel for the Government vouched to the jury in this case:

> "I will tell you who David Lubben is. He is an honest, honorable, American citizen. • • • Dave Lubben is telling the truth (R. 2937).
>
> "What you have seen are the [Lubben] records which were kept by competent, honest, people." (R. 2879.)

And present counsel ask this court, despite the record here, to accept Lubben as truthful—to send citizens to prison on his "exaggerated" words.

Obviously in 1953 Prosecutor Lockely was in grievous error as to Lubben's "honorableness." And Judge Nordbye agrees with us, for he found on the new hearing (App. 1758):

> "* * * that Lubben may have exaggerated the amounts of the payments that he and his confederates made to Shotwell is entirely probable."

The foregoing is not a finding of inadvertent mistake by Lubben, but is one of willful "exaggeration," *i.e.*, perjury. The finding is not a mere "remark" or "comment" by the court, as the Government's brief now would make it; it is as much a finding of fact as any statement in Judge Nordbye's opinion.

Had the jury at bar been advised by the United States attorney that Lubben was a congenital perjurer rather than having dinned into it that he was "an honest man," had it been advised, as the fact was, that Lubben's purported books were not true but were "doctored," it well might have believed that at least petitioners Cain and Sullivan, who took the stand and protested their innocence, were innocent.

The inescapable fact is that the trial judge found in 1959, not that Lubben was "mistaken," but that he "exaggerated." The latter is a polite and euphemistic term for lying. To affirm these judgments would be to send petitioners to prison on known lies.

The Government brief would excuse all this by asserting that nevertheless it is plain that petitioners had appropriated to their own personal use "hundreds of thousands" of dollars of black market money. That is not the asserted crime for which they were indicted. Nor is it a question for courts or prosecutors to decide; it is for a jury in a fair trial. And the claim is unsound: First, "hundreds of thousands" depends upon accepting at face value Lub-

ben's claims as to the gross amount he paid. But it is agreed his claims cannot be accepted. Necessarily a far smaller gross sum was involved. The Government proof showed that large amounts of money actually were spent by Shotwell for raw corn. Any reasonable evaluation of the evidence necessarily places such expenditure figures at somewhere between $150,000 and $200,000, perhaps more. Additionally, Huebner admits he personally nipped out $45,000. If what Huebner took be added to what Shotwell necessarily spent for corn, there simply is not a balance of "hundreds of thousands" of dollars to be accounted for. Finally, in any event, these were questions of fact to be determined by a jury which did not have the United States solemnly assuring it that testimony which in fact was perjured or "exaggerated," was true.

Much of the Government brief on this head is a detailed jury argument that Lubben should be believed. The Government endeavors to take the sting out of the fact that in 1953 the trial court found Lubben was "truthful" and "sincere" but contrariwise in 1959 found that he had "exaggerated" and out of the fact that both Huebner and Grathund, testifying as Government witnesses, either said that Lubben had "lied on the stand" or was "mistaken" as to substantial items.

Plainly the evidentiary minutiae of a 5,000 page record cannot be reviewed in this court. If the court wishes to examine some of the Government's present contentions it will find some answering material in the appendix hereto.

It will not do to say, as the Government does, that this case may be distinguished from *Mesarosh* or *Communist Party* because it appeared in those cases that testimony of government witness was "substantially untrue" while here it is counsels' opinion that Lubben's testimony was "*substantially* true." In *Mesarosh* there was no determina-

tion as to whether the testimony Mesarosh had given in the case in question was substantially true or false; merely that in *other* cases he had given untruthful testimony and his standing as a witness was so wholly discredited as to taint the record. And in *Communist Party* the Court pointed out that a reviewing court could not remove the taint of perjury by simply finding that there still was in the record ample innocent testimony to support the Board's findings. In this case false evidence "exaggerated" evidence appeared before sentencing: Judge Nordbye found it was "exaggerated." Justice can be accomplished only by cleansing the record of "exaggeration."

IV.

THE JURORS WERE ILLEGALLY SELECTED.

(Petitioners' Main Brief, pp. 90-107.)

A. Jury Commissioner Crooks Delegated His Duty of Selection.

Rather than answering our challenge to specify one bit of evidence that the Jury Commissioner exercised the faintest degree of judgment or appraisal in selection of any of the jurors, grand or petit, the Government resorts to the generality that everything Jongsma did was under the supervision and direction of Crooks. This, in a generic sense, is true; it is true whenever a duty is delegated. But it is not true, as the Government erroneously asserts (p. 109), that "Crooks did not delegate; nor Jongsma exercise, the ultimate responsibility for deciding from what source the names of prospective jurors would be solicited" (G. Br., p. 109). That statement is flatly contrary to the record:

> Q. "And did you tell him [Jongsma] from what sources to get names?"

Mr. Crooks: "No."

Q. "You left that up to him?"

Mr. Crooks: "Yes. I assist him."

Q. "He makes the decision as to what names to get?"

Mr. Crooks: "Yes." (S. 242.)

Crooks was asked whether at any time in a four and one-quarter year period letters were sent to postmasters to furnish prospective names and said "I can't tell you" (S. 235). He agreed that it was "fair to say that Richard does the work and gets the names and [he paid] Richard" (S. 236). What more inclusive answer could be asked for than "He does all the work, and I take all the honor, if there is any" (S. 229).

Thus Jongsma alone exercised judgment as to whether James C. Mullaney would be a suitable juror (App. 323) and the same for all the others (see App. 323, *et seq.*). Jongsma accepted a juror who served in this case but who had a hearing defect that would interfere with his service as a juror (App. 327). He "accepted" some jurors from whom he had no questionnaires and about whom he knew nothing (App. 325).

In passing on the questionnaires returned by the jurors Jongsma regarded each question on the questionnaire as material and affecting the juror's eligibility to serve (App. 328). But this plainly was not so. Several of the questions, although eliciting interesting information, did not affect the prospective juror's legal eligibility (S. 253-255). Crooks, instead of telling his delegate how to do his job, "told me to use my discretion" (App. 336), and rather than telling him from what sources to get names "left that up to him" (S. 242).

Insofar as sending letters to various organizations for names, Jongsma alone decided which of the "various labor

organizations, clubs, churches, church organizations, etc." (App. 324) he should solicit; not Crooks, but "I," Jongsma, "would decide which counties we should work on in getting names at any time" (App. 351).

Jongsma went through the "Redbook" section of the telephone directory and decided to which clubs or organizations to send requests for jurors (App. 355). Only Jongsma read the questionnaires and made the decisions as to who to include or exclude; only if he was puzzled would he go to Mr. Crooks and ask what to do and that was only in a relative "handful" of cases (App. 360).

The Government flippantly suggests that all that Jongsma did was to determine whether prospective jurors, according to their answers in the questionnaires, fell within the statutory exemptions or disqualifications and that such was a job which "could just as well have been performed by an IBM machine" (G. Br., p. 110). Forgetting the flippancy of that argument, the cold fact is that so far as determining strict legal eligibility an IBM machine probably could have done a *better* job than Jongsma did for an IBM machine could have been "taught" or "keyed" as to which of the questions in the questionnaire went to statutory eligibility and which did not, and could have been keyed to show that volunteers were illegal under the law of Illinois, a fact of which Mr. Jongsma was ignorant (App. 337) and which ignorance was reflected in the choices he made. But we have not yet arrived at a point in this country where the delicate exercise of judgment of selecting those of our peers who will determine our fates is to be left to machines.

If illegal delegation of discretionary duties and exercise of judgment was not proved in the case at bar, it is hard to see how it ever can be proved. Most of what is said at pages 108 and 109 of the Government brief simply cannot be supported in the record.

B. Volunteers Are Illegal Under the Law of Illinois.

The Illinois statute, which applied to federal jurors at the time the jurors here were selected, flatly disqualified all volunteers, not merely those who might volunteer when the sheriff went on the street to fill an incomplete venire. If the court will refer to Section 13 of the statute set forth at Appendix page iii of our main brief it will see that Section 13 is in three separate sentences. The first sentence pertains to filling an insufficient panel. The second sentence is general and disqualifies *all* volunteers. The third sentence is general and pertains to all volunteers or persons seeking to place volunteers upon juries.

As to the evil of the system of volunteers, we refer to the main brief. Government counsel have been unable to cite a single case that approves the practice of accepting volunteers. There have been cases which have excused officials who have accepted volunteers where none of the volunteers were traced to the particular jury which sat or where the volunteers were so few in number as apparently not to constitute a severe problem. There is no case that has come anywhere near suggesting that a jury is legally composed when, according to the Clerk who should know best, approximately 20% of his nominees were volunteers (S. 169) and where 39% or 43% of the indicting grand jury were volunteers (see our main br., p. 99). If such a system were to be approved, this Court would be opening the way for pressure groups to infiltrate themselves on to federal juries, to destroy the "cross-section" requisite for juries and to vitiate the system.

C. The Methods Used by the Clerk Were Improper.

There have been various cases in which limited use of the sponsor system as a means of obtaining jurors has been approved but none has approached what the clerk did here. It is plain that the clerk was searching for what he subjectively deemed to be "good" jurors (S. 126, 127, 128) rather than to obtain a true cross-section. His methods could not, and did not, produce a cross-section.

D. Petitioners Are Entitled To Raise the Jury Points.

There have been many cases in which insubstantial criticisms of jury selection procedures have been overruled on the ground that the objection was belatedly raised. The two inapposite cases on which the Government principally relies are examples. In *Stubs* v. *United States*, 367 U. S. 263, there was a mere sending out of letters asking for suggestions as to possible jurors. No illegal standards were followed, no volunteers were accepted, and there was no delegation of authority. In *Frazier* v. *United States*, 335 U. S. 497, there was no claim that the jury lists were improperly made up (see 335 U. S., p. 500). The complaint was that in the District of Columbia the jury list was heavily laden with governmental employees; nevertheless, in exercising his peremptory challenges the defendant had failed to excuse Government employees and, on the contrary, had excused several private citizens.

Counsel assert that petitioners are attempting to challenge the jury panels in a "collateral proceeding." This is without merit. Petitioners are proceeding in the case in which they are indicted, and raised the jury points after all judgments had been set aside and when the record was reopened.

V.

SULLIVAN DID NOT HAVE A FAIR TRIAL

(Petitioners' Main Br., pp. 108-109.)

The most crucial documents in the case had not even been offered by the Government against Sullivan, and were not admitted against him; much oral testimony was not admitted against Sullivan; nevertheless instructions were given to the jury that all that evidence should be considered against Sullivan to determine his intent to commit the crime of tax evasion. (The Government Brief says that this objection "is frivolous", (p. 116).

The crucially important disclosure Exhibits are described at Government brief, pp. 52-3, and the Government concedes (p. 53): "None of these documents was admitted against Sullivan (R. 2589, 2611, 2812, 2817)" yet the jury was instructed to consider them against Sullivan (R. 2969). Oral admissions of Cain with respect to the disbursement figures were never admitted against Sullivan (R. 1938). Yet the instructions told the jury Cain's admissions were to be considered in judging Sullivan (R. 2969).

The same error of instructing the jury to consider against Sullivan what was not in evidence against him was repeated by the trial court over and over: (a) the dramatic "three-pile" conversations were not in evidence against him (R. 814-5, 822-3) but the instructions allowed them to be considered to convict him (R. 2967-2968); (b) various conversations with respect to checks had not been admitted against Sullivan (R. 864), still the jury were told to consider them against Sullivan (R. 2953); (c) testimony as to asserted payments the jury was told to consider against Sullivan (R. 2952) although it had not been admitted as to him (R. 814).

The instruction practices of the trial judge as to Sulli-

van were thus seriously erroneous. There is always a grievous risk that a jury will transfer over to a defendant matters not admitted against him (*Blumenthal* v. *U. S.*, 332 U. S. 539, 559). The trial court must be careful that the instructions scrupulously safeguard each defendant for they are his sole bulwark against conviction on evidence not admissible against him (*Kotteakos* v. *U. S.*, 328 U. S. 750, 776; *Bollenbach* v. *U. S.*, 326 U. S. 607, 612-3). Where there was an instruction which let the jury assume they could convict on evidence not admitted against a defendant a new trial must be given (*Anderson* v. *U. S.*, 318 U. S. 350, 356).

The Government does not answer the foregoing point. It merely calls to this Court's attention an instruction which said, in general terms, that statements or acts out of the presence of a defendant are "not binding" upon him (R. 116).[6] One general instruction did not obviate the error committed when the jury was repeatedly told they could consider specific evidence against Sullivan though that evidence was not offered or admitted against Sullivan.

Government Brief (p. 116-7) argues that Sullivan's attorney told the jury that Sullivan directed a disclosure be made and thereby waived any objection to instructions. Counsel by stating a disclosure was made certainly does not waive objections to instructions. The objections were made when required by Criminal Rule 30 (R. 298-306).

The final statement in the Government Brief is that Sullivan joined in requesting an instruction as to disclosure (p. 117); but the instruction to which the Government Brief refers (R. 3210) is vastly different from the one

6. Such an instruction is said to be even more favorable than the defendants deserved, because of the rule in conspiracy cases. This was not tried as a conspiracy case. The trial judge stated to defense counsel early in the trial: "You are thinking of a conspiracy case. This is not a conspiracy case." (R. 865.)

given (R. 2970). Sullivan never asked to be judged (as he was) on evidence not admitted as to him.

The only specific evidence against Sullivan was testimony by Lubben of an alleged admission by Sullivan; but Lubben recanted the very next morning (Br. 108). The *corpus delicti* with respect to Sullivan depending solely on an extra-judicial admission his conviction cannot stand for the admission was not corroborated, in fact it was recanted. (*Smith* v. *U. S.* (1954), 348 U. S. 147, 154-155; *U. S.* v. *Calderon* (1954), 348 U. S. 160, 163-4.)

CONCLUSION.

Petitioners respectfully repeat the prayers and suggestions in the conclusion of their main brief (pp. 110-111).

Respectfully submitted,

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APPENDIX.

At various places in the Government's presentation, counsel argue the merits of the jury case. We do not conceive this Court to be the place to argue the merits. Supposedly, the questions we have raised will be determined irrespective of any notion as to whether petitioners were probably guilty or probably innocent of the crime charged in the indictment.

Nevertheless, since the Government continues to assert that on Lubben's books and records, it had a strong case, and since counsel persist in putting various fact and dollar assertions into their brief, we wish to make at least some showing that the assertions are answerable:

Lubben's "Records."

Set forth at page 19 of the Government's brief is a tabulation of payments which the Government asserted it proved. This tabulation starts out with an item of $10,849. At page 80 of the brief the brief-writers take this $10,849 item as a typical example to show how thoroughly so they claim, the Government's case on the merits was proved. An examination of the record as to this example shows quite the contrary. It shows that from the very beginning Lubben was altering and changing his books and purporting to charge against Shotwell items which in fact he either had pocketed or paid to other persons.

Supposedly the $10,849 was paid on January 19, 1945 to Huebner in New York from the proceeds of a cash check in that amount (R. 812; G. Ex. 27). Supposedly it is corroborated by, and based on, a typewritten memorandum

(G. Ex. 27A) listing shipments from December 6, 1944 to January 12, 1945, showing total asserted "overages" of $17,508, against which $8,000 is shown as having been advanced, leaving a balance of $9,508 to which $1,341 was added in longhand. There is a handwritten note on the memorandum "Paid Jan. 19 45 CD 56 $10849."

However, the ledger or accounts payable sheet (G. Ex. 6A) supposedly reflecting this asserted payment shows the following: Between November 9 and November 30, 1944 there was credited to the account a total of $19,064 of overages. The account was in balance as of September 15, 1944, and it contains no possible combination of debit figures which would show payment of the amount of the November 9-30 invoices *and* overages by the end of the year. A *journal entry* rather than a withdrawal of cash in accordance with Auditor Bereu's asserted system, was made as of December 31, debiting the account $15,364. Moreover, *after* this December 31st journal entry was noted on the account payable ledger (G. Ex. 6A), an entry, post-dated Dec. 6, was made debiting the account $4,200. Supposedly, under the system, this was a payment to Huebner but reference to Cash Disbursements book, p. 29 (G. Ex. 7), shows *that at the time the payment was made* on December 6, it was charged to "General Commercial Association" and someone *later altered the Cash Disbursement book on its face and wrote in "Shotwell."* It is apparent, therefore, that as of December 31 no substantial part of the ascribed overages of $19,064 down to November 30, were paid to Shotwell or to Huebner. It is equally apparent that, from the beginning, money was being diverted through this account to parties not connected with this case.

If the debit entries of G. Ex. 6A down to January 19, the date of the asserted $10,849 payment, are examined it will be seen that there is no debit, or combination of

debits, which would make up the $8,000 advance shown on the alleged typewritten memorandum (G. Ex. 27A). Bookkeeper Feldman, testified that she made the notation on G. Ex. 27A (R. 1439). She first said (R. 1441) that "that entry paid the overages on the specific group of invoices." The "group" shown on the memo, including the one written in at the foot thereof, were those reflected in the credit entries on the account from Dec. 6, 1944 through Jan. 13, 1945. Subsequently, she testified that the check for $10,849 covered only the "overages" she had added to the invoices received as G. Ex. 23A, 24A, 25A and 25B (R. 1452-3). She was obviously incorrect in this because those "overages" total only $6,645. Although Miss Feldman testified at one point that the records indicated the payment was paid "to the Shotwell Manufacturing Company" (R. 1441) she admitted that she had no personal knowledge as to whether they were so paid, nor did she ever see a payment made to Shotwell, or any of its officers or employees (R. 1564, 1585, 1594, 1611, 1693-4).

Government counsel also assert (p. 49) that witnesses other than Lubben said that they had acted as messengers in making payments for him. Let us take Lubben's brother-in-law Moran for example, who testified he paid Huebner $17,190.25 cash in December 1946, as the proceeds of a cash check (G. Ex. 133) in like amount dated December 4, 1946. Moran said he saw Lubben and one Urban of Chicago endorse the check, and it does bear their endorsement, but that he alone went to the Mid City Bank in Chicago, where he was unknown and, after some difficulty (R. 1298), secured the cash on the check without being required to endorse it (R. 1303) or having an officer of the bank approve the transaction (R. 1306). Moran said he accomplished this by giving the paying teller a five pound box of candy (R. 1311).

However, the Mid City Bank officer testified that in fact

Urban, who was known to him, presented the check to him; that he okayed it for payment order carried it to the cage where teller No. 2 made the payment; *that Lubben, who endorsed the check, got the money* (R. 1992-2005).

Thus at the beginning and at the end of the asserted transactions one finds strong evidence that Lubben was diverting money either to his own pocket or to persons not connected with this case.

The Government's supposedly fearsome paper case will not withstand examination.